

I. DEFENDANTS MADE NO GOOD FAITH ATTEMPT TO CONFER REGARDING THEIR MOTION

The court should refuse to hear Defendants' motion for leave to file a sur-reply because their alleged efforts to confer with Plaintiffs' counsel as required under Local Rule CV-7(i) did not constitute a good-faith attempt to resolve the matter by agreement. Defendants' counsel telephoned and then sent an email to Plaintiffs' counsel late in the afternoon on October 24, 2017 to request a conference, but waited less than an hour for a response before filing their motion. Declaration of Christopher Wimmer, ¶¶ 2-3 & Exh. A (Defendants contacted opposing counsel at 7:26 p.m. Central time); ECF 29 (Defendants filed their motion at 8:22 p.m. Central time).

II. PLAINTIFFS DID NOT RAISE ANY NEW ISSUES IN THEIR REPLY

Defendants' alleged justification for their motion is that Plaintiffs contended in their reply that Defendants had waived their right to arbitration. However, Plaintiffs specifically raised Defendants' waiver of arbitration in their initial motion papers. ECF 24 at p. 10. Defendants had ample opportunity to respond to Plaintiffs' argument and, in fact, used three and a half pages of their response brief to explain why certain Plaintiffs were still bound by the arbitration agreement and to state the position that Defendants still intend to arbitrate their students' claims. ECF 25 at p. 7-11.

To the extent that Defendants seek leave for a sur-reply to show that Plaintiffs have legally and factually failed to satisfy their burden to show waiver, leave should be denied. Defendants already made those arguments in their response. ECF 25 at 14.

All the arguments made by Plaintiffs in their reply brief address points raised by Defendants in their response, and Plaintiffs made no new arguments and raised no new issues. Furthermore, the authority that Defendants seek to distinguish, *Yesh Music v. Lakewood Church*, 727 F.3d 356 (5th Cir. 2013), was cited in support of Plaintiffs' reply to Defendants' argument that 27 of the proposed new plaintiffs are barred from re-

asserting their claims under Rule 41(a)(1)(B). Again, this is not an issue raised for the first time in a reply brief.

Defendants' sur-reply constitutes an improper attempt by their new counsel to make additional arguments that their original counsel failed to make in their response brief. This is not an adequate justification for granting leave to file a sur-reply, and Defendants' motion should be denied.

Dated: October 31, 2017

Respectfully submitted,

By: s/ Christopher Wimmer
Christopher Wimmer

SERNA & ASSOCIATES PLLC
Enrique G. Serna (State Bar No. 00178617)
20985 IH 10 West
San Antonio, Texas 78257
Phone: (210) 228-0095
Fax: (210) 228-0839
enrique@serna-associates.com

EMERGENT LLP
Christopher Wimmer (*pro hac vice*)
Peter Roldan (*pro hac vice*)
Jason Fisher (*pro hac vice*)
535 Mission St., 14th Floor
Phone: (415) 894-9284
Fax: (415) 276-8929
chris@emergent.law
peter@emergent.law
jason@emergent.law

Attorneys for Plaintiffs CLAUDIA OCORO,
ISRAEL ROSALES, DIANA ALVARADO HARRIS,
CYNTHIA WOODS JONES, GALE JONES, et al.

CERTIFICATE OF SERVICE

I hereby certify that counsel of record listed below, who are deemed to have consented to electronic service, are being served this 31st day of October, 2017 with a copy of this document via the court's CM/ECF system per Local Rule CV-5.

Jason Davis
Santos Vargas
Davis & Santos, P.C.
719 S. Flores St.
San Antonio, Texas 78204
(210) 853-5882 (Telephone)
(210) 200-8395 (Facsimile)
jdavis@dslawpc.com
svargas@dslawpc.com

*Attorneys for Defendants Armando Montelongo, Jr., Real
Estate Training International, LLC, Performance
Advantage Group, Inc., and License Branding, LLC*

/x/ Christopher Wimmer

Christopher Wimmer